



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

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MEMORANDUM

TO: State Water Control Board Members
FROM: Ellen Gilinsky, Ph.D., Director, Water Division
DATE: July 1, 2008
SUBJECT: Request to Proceed to Public Hearing and Comment on Proposed Amendments to the Water Quality Standards – 9VAC25-260-275. Protection of Eastern Shore Tidal Waters for Clams and Oysters

EXECUTIVE SUMMARY

Staff will request Board approval to proceed to Notice of Public Comment and hearing with proposed amendments to the Water Quality Standards regulation to include a new section, 9 VAC 25-260-275 that requires an analysis be conducted to determine if a wastewater management alternative other than a Virginia Pollutant Discharge Elimination System discharge to shellfish waters on the Eastern Shore would be feasible, produce less of an environmental impact, and not result in significant social and economic impacts. This requirement is initiated when applications for new or expanded VPDES discharges to Eastern Shore waters result in condemnations but are not denied pursuant to 9 VAC 25-260-270 (Shellfish buffer zones; public hearing).

PURPOSE

The purpose of the proposal is to provide additional water quality protection for clams and oysters in waters on the Eastern Shore of Virginia and to ensure that the wastewater management disposal alternative chosen for that area has less of an environmental impact than another alternative. The proposal is intended to reduce condemnations on the Eastern Shore so more waters may be protected for clam and oyster production, including aquaculture.

BACKGROUND

This rulemaking began as a Governor's initiative to support aquaculture wherein he requested ways be identified that encourage consideration of alternatives to the discharge of wastewater for treatment facilities on the Eastern Shore. The goal was to enhance high quality waters which are especially well-suited for shellfish or aquaculture operations and to safeguard important shellfish habitat areas and the sustainability of Virginia's aquaculture industry by providing additional water quality protection for these waters on Virginia's Eastern Shore.

The initiative also supports the Virginia Coastal Zone Management Program's Seaside Heritage Program which strives to protect coastal resources and ensure the growth of sustainable industries such as shellfish farming and ecotourism that depend on high water quality.

A Notice of Intended Regulatory Action (NOIRA) was published in Virginia Regulatory Town Hall on September 17, 2007 with the comment period ending November 30, 2007. A public meeting was held in Painter, VA on October 17, 2007. A summary of comments is attached in the draft Virginia Regulatory Town Hall Proposed Regulation Agency Background Document.

The Department utilized the participatory approach by forming an ad hoc advisory committee that held three public noticed meetings (March 18, April 24 and May 22, 2008) on the Eastern Shore. A summary of each of these meetings is provided at the following web address <http://www.deq.virginia.gov/wqs/rule.html#SHELL>. Generally, the committee had varying opinions on whether to include all Eastern Shore waters for this new requirement or to choose individual areas. Several members were concerned about the appearance of 'designating' waters for aquaculture when other uses apply (i.e. recreation). Concerns were raised over the costs of an alternatives analysis. The committee also discussed the timing of the alternatives analysis and how it relates to the existing regulation Section 270 (Shellfish buffer zones; public hearing) in light of the recent Captain's Cove decision.

Staff attempted to craft a regulation that does not 'designate' waters for aquaculture; rather applies the requirements to the applicant of discharge permits to all Eastern Shore waters. Staff also inserted a phased approach to the alternatives analysis in an attempt to relieve costs of the analysis. Staff also developed the draft so that the requirement for conducting an alternatives analysis applies only to a proposed new or expanded discharge that would not be denied under Section 270 but would result in a shellfish condemnation. Staff believes the proposal takes a balanced approach to enhancing protection of these waters while also limiting additional regulatory burdens.

SUMMARY OF PUBLIC COMMENT

See attached Town Hall document.

IMPACTS OF THE AMENDMENTS

See attached Town Hall document.

ATTORNEY GENERAL CERTIFICATION

These amendments have been forwarded to the Office of the Attorney General for agency statutory authority, but authority has not yet been granted. The amendments will be proposed "contingent upon Attorney General Office statutory authority" if not received by the July Board meeting.

ATTACHMENTS

Attachments to this memo to aid in your review of these regulatory amendments are as follows:

Attachment 1 is the Virginia Regulatory Town Hall, June 19, 2008 that includes a table listing by subsection letter each proposed change and rationale for that change and a table summarizing public comment.

Attachment 2 is the proposed language.

Attachment 3 is the list of the members of the ad hoc advisory committee.



Virginia
Regulatory
Town Hall

townhall.virginia.gov

Proposed Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25 -260
Regulation title	Water Quality Standards
Action title	Add requirements for an analysis of wastewater treatment alternatives for proposed point source discharges to waters on the Eastern Shore to protect clams and oysters
Date this document prepared	June 19, 2007

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The substantive changes to the regulation are to include a new section, 9 VAC 25-260-275 that is initiated when applications for new or expanded VPDES discharges to Eastern Shore waters are not denied pursuant to 9 VAC 25-260-270. If these discharges result in shellfish condemnations, then the applicant must analyze whether wastewater management alternatives other than a discharge would be feasible, produce less of an environmental impact, and not result in significant social and economic impacts to beneficial uses and to the locality and its citizens. If the analysis demonstrates that an alternative meets these criteria, then that alternative must be pursued for approval prior to the board taking action on the discharge alternative. No changes were proposed to 9 VAC 25-260-270 of the Water Quality Standards or to the Policy for the Protection of Water Quality in Virginia's Shellfish Growing Waters at 9 VAC 25-370.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Federal and state legal authority to promulgate this proposed regulation exist in the Clean Water Act at 303(c), 40 CFR 131 and the Code of Virginia in §62.1-44.15(3a). The most relevant law is the Code of Virginia at §62.1-44.15(3a). The promulgating entity is the State Water Control Board.

The scope and objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Clean Water Act at 303(c) (1) requires that the states hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.

The scope of the Federal regulations at 40 CFR 131 is to describe the requirements and procedures for developing, reviewing, revising and approving water quality standards by the States as authorized by section 303(c) of the Clean Water Act 40 CFR 131 specifically requires the states to adopt criteria to protect designated uses.

The scope and purpose of the State Water Control Law is to protect and to restore the quality of state waters, to safeguard the clean waters from pollution, to prevent and to reduce pollution and to promote water conservation. The State Water Control Law (Code of Virginia) at §62.1-44.15(3a) requires the Board to establish standards of quality and to modify, amend or cancel any such standards or policies. It also requires the Board to hold public hearings from time to time for the purpose of reviewing the water quality standards, and, as appropriate, adopting, modifying or canceling such standards.

The authority to adopt standards as provided by the provisions in the previously referenced citations is mandated, although the specific standards to be adopted or modified are discretionary to the Environmental Protection Agency and the state.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

This amended regulation is essential to the protection of health, safety or welfare of the citizens of the Commonwealth. Proper water quality standards protect water quality and living resources of Virginia's waters for consumption of shellfish, recreational uses and conservation in general.

The goals of the proposal are to provide additional water quality protection for clams and oysters in waters on the Eastern Shore of Virginia and to ensure that the wastewater management disposal alternative chosen for that area has less of an environmental impact than another alternative. The proposal is intended to reduce condemnations on the Eastern Shore so more waters may be protected for clam and oyster production.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The substantive provisions to the regulation include a new section, 9 VAC 25-260-275 that applies to new or expanding individual VPDES permit applications discharging to or affecting waters on the Eastern Shore. This section is initiated when applications for new or expanded VPDES discharges to Eastern Shore waters are not denied pursuant to 9 VAC 25-260-270 but still result in a shellfish condemnation. These applications must have an analysis that shows if a wastewater management alternative other than a surface water discharge would be feasible, produce less of an environmental impact, and not result in significant social and economic impacts to beneficial uses and to the locality and its citizens.

Section 275 also inserts an allowable phased approach to the analysis to help reduce costs to the localities and other applicants. First the feasibility of each alternative can be analyzed. If technically feasible, then the environmental, socio-economic and mitigation opportunities can be analyzed.

Section 275 also describes the three scenarios that can result from the analysis and how each scenario proceeds. The first scenario is that the VPDES surface water discharge is the 'best' option (the only technically feasible option or the best option for the environment). In that case, the VPDES application proceeds. The second scenario is that an alternative proves to be the best option for the environment but results in adverse socio-economic impact. In that case, the VPDES application proceeds. The third scenario is that an alternative to VPDES is the best option for the environment and causes no significant adverse socio-economic impact. In that case, a good faith effort must be made to pursue the alternative. If the alternative is disapproved by the appropriate regulatory authority, then the VPDES application proceeds.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The primary advantages to all aspects of the public are to help ensure protection of good water quality and reduce condemnations in Eastern Shore waters to promote clam and oyster growth for commercial and recreational uses. The primary disadvantages to the public, specifically businesses or localities applying for new or expanded discharges, is in the cost or impact of having to do an alternatives analysis if they fall under the requirements of this new section.

There are no advantages to the agency or Commonwealth. The disadvantage is that it will expend additional staff resources to implement this new requirement.

Eastern Shore localities must be aware of these requirements and consider these when planning for increased sewage disposal.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

The requirement for a wastewater disposal management alternative analysis is more restrictive than applicable federal requirements. The rationale for the need was set forth by the Executive Office of the Commonwealth of Virginia to protect these sensitive good quality waters that are threatened by new or expanded wastewater discharges.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are localities particularly affected by this regulation as follows:

Accomack and Northampton Counties and the Towns of Accomac, Belle Haven, Bloxum, Cape Charles, Cheriton, Chincoteague, Eastville, Exmore, Hallwood, Keller, Melfa, Nassawadox, Onancock, Onley, Painter, Parksley, Saxis, Tangier, Wachapreague.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal, the impacts on the regulated community and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal, the potential impacts of this regulatory proposal and any impacts of the regulation on farm and forest land preservation. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so at the public hearing or by mail, email or fax to Eleanore Daub, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, (804) 698-4111 (phone), (804)698-4032 (fax) or emdau@deq.virginia.gov (email). Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at www.townhall.virginia.gov. Written comments (including email) must include the name and address of the commenter. In order to be considered comments must be received by 5:00 p.m. on the date established as the close of the comment period.

A public hearing will be held and notice of the public hearing will appear on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov) and can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

A formal hearing will be held at a time and place to be determined if a request for a formal hearing is received by the contact person listed above within 30 days of publication of the notice of public comment period in the Virginia Register of Regulations. The request for formal hearing is to include the information set forth in 9 VAC 25-230-130 B of the Board's Procedure Rule No. 1.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

a. Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures.

Projected costs to the state resulting from this regulation are anticipated to be negligible as the "Alternatives Analysis" (analysis) will only serve as a permit review and decision-making framework that would assist DEQ permitting staff. The analysis will be incorporated into the existing Virginia Pollutant Discharge Elimination system (VPDES) permit program and would bear no additional cost burden on the staff than usual.

b. Projected costs of regulation on localities:

Each locality proposing a new or expanded sanitary wastewater discharge may have varying requirements and/or needs in terms of their adoption of the analysis. Summarized below is a thematic description of the analysis process followed by a best guess estimate of the potential costs of undertaking such an analysis:

The analysis is comprised of the following two phases:

Phase 1: Technical feasibility

This phase would involve an assessment of the land availability for alternative treatment of surface water discharge and also the related soil composition and type. Such an assessment would cost approximately \$30,000 and could vary based on the nature and size of expansion. This best-guess estimate is the cost that all permit applicants subject to the regulation would have to incur as Phase 1 is required of all applicants.

Phase 2: Environmental analysis and socio-economic impact analysis

This phase would involve an assessment of the environmental and socio-economic effects of adopting the select alternative technology. Environmental analysis would include a review of groundwater impacts, swimming or recreational impacts and shellfish condemnations. Socio-economic impact analysis of any technically feasible alternative would include an analysis of the affordability of the land, technology, positive and negative tax revenue impacts to the locality, eco-tourism, recreation and aesthetics.

Such an analysis that includes an accounting assessment of the technology options and mitigation measures and socio-economic welfare assessment for a typical proposed expansion of a locality's wastewater discharge could cost the applicant approximately \$ 35,000 to \$55,000.

Total net cost burden to the applicant for undertaking the analysis

Estimated costs to the applicant of conducting a Phase 1 analysis only: \$30,000

Estimated total costs to the applicant if conducting both a Phase 1 and 2 analysis: \$ 65,000 - \$100,000

c. Description of the individuals, businesses or other entities likely to be affected by the regulation:

Any public or private entity that proposes new construction or expansion of existing facilities to discharge sanitary waste into estuarine waters or close enough to such waters as to create the potential for bacterial contamination if there were a treatment plant failure.

d. Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small businesses means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.

Currently only one development project (most likely a small business) and three or four municipalities may be affected, if they propose a new or expanded surface water discharge.

e. All projected costs of the regulation for affected individuals, businesses or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.

The costs of the regulation to affected individuals and/or businesses would be same as explained above in section b.

f. Beneficial impact of the regulation:

The key benefits of this regulation would be:

1. Provide additional protection to high quality waters that are suitable for shellfish growth.
2. Improve regulatory consistency and clarity in terms of areas of high quality waters for current and/or future shellfish resources and also provide necessary guidance on VPDES permit application process for proposed new or expanding facilities that may have surface discharge of sanitary wastewater.
3. Reduce transactional costs of conducting a permit review and provide adequate options for agency staff to better review future VPDES permit applications on the eastern shore.
4. Assess socio-economic impacts of proposed project in terms of its selecting alternative treatment technology or undertaking surface water discharge.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

Some alternatives considered by the Department included the following:

- Whether the focus of the rule should be on protection of the aquaculture industry, the clam or oyster aquaculture industry, mollusks, shellfish, clams, oysters or a combination. The technical advisory committee consensus was that the rule should focus on protection of clams and oysters and the focus on the aquaculture industry was not preferred. The agency chose to focus on protection of clams and oysters.

- Whether the requirements should apply to all shellfish waters in the state, selected state shellfish waters, all Eastern Shore shellfish waters or selected waters on the Eastern Shore. The Governor's initiative was oriented to Eastern Shore waters, so this was where the focus of the rule remained. Many of the committee members thought this enhanced process should be applied to applications for a proposed discharge to any of the tidal waters of the Eastern Shore. However, several committee members favored having this approach apply only to selected waters of the Eastern Shore, but they were also concerned that establishing specific zones for aquaculture protection might lead to unintended future regulatory actions or unfair advantages to areas without the requirements. Staff decided upon the alternative to apply the requirement to all Eastern Shore tidal waters.
- Staff considered what criteria would be expected in an alternatives analysis and what flexibility options should be built in. The technical advisory committee discussed how feasibility, environmental impacts and socio-economic impacts of each alternative should be part of the rule. Staff included these criteria and in response to ad hoc advisory committee members concerns about costs, introduced a phased approach to this analysis.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The goals of the proposal are to provide additional water quality protection for clams and oysters in waters on the Eastern Shore of Virginia and to ensure that the wastewater management disposal alternative chosen for that area has less of an environmental impact than another alternative. The analysis itself is necessary to ensure the best environmental waste disposal option is chosen. The cost to small businesses is the same as any entity and in the economic impact section. Adverse impacts on small businesses or any business or locality has been minimized by providing for a phased approach in conducting the alternatives analysis so that technically infeasible alternatives need not be analyzed.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
Accomack County Board Of Supervisors	Welcomes the Commonwealth's interest and hopes for an outcome that will provide true and lasting economic and environmental enhancement for the Eastern Shore. The immediate concerns are that water quality should be addressed comprehensively (industrial, residential, and agricultural). We have experienced the degradation of the Chesapeake Bay and this presents a unique opportunity to demonstrate a fresh approach with consistent and disciplined application of comprehensive safeguards. Every contributor must be scrutinized. Concerned about the composition of the TAC. Must	Many different stakeholders were invited to be on the TAC and most were from the Eastern Shore (aquaculture, developers, environmentalists, agriculture, local population, localities). Economic and environmental interests were built into the proposal as criteria for deciding

	reflect Eastern Shore interests and concerns. Include the President of the Working Waterman's Association and local leaders familiar with local surface water and ground water issues. Treat Accomack and Northampton similarly to appointments to the TAC.	upon the best wastewater disposal option.
Jim Belote, III (private citizen)	No new regulations are needed until the agency has consulted and worked with the local governing bodies. Local initiatives should be investigated as well as educating the people on existing regulations. Regulations should be passed as a last resort after all other approaches have been implemented and deemed unsuccessful. Any new regulations should apply to all shellfish areas in Virginia and not be discriminatory to two counties.	The Governor and many other citizens of the Eastern Shore believe additional regulations are needed at this time. The requirements may be expanded to include other waters but the focus of this initiative was to protect the high quality waters currently existing on the Eastern Shore.
Myron and Frances Birch (private citizens)	Please appeal the Captains Cove decision.	This option was undertaken by the Attorney General's Office.
Kenneth Blanchard (clam industry, Accomack Co.)	Supports. Volunteered for TAC and provided experience.	DEQ acknowledges the support and several aquaculture industry representatives served on the TAC.
Jean Bleagent	Educational meetings should have been the first step. We don't know enough about the rule to comment. Local government should handle this. Didn't seem right to have regulations for only these two counties.	A Notice of Intended Regulatory Action is supposed to be broad in order to get input from the public on directions to take to produce a reasonable regulation. The TAC was educated about existing DEQ and VDH programs before discussing the details of this rulemaking. The focus of the Governor's initiative was towards the Eastern Shore waters.
Steven Bunce (Shooting Point Seafood, LLC)	Supports. He has lost clams from very low salinity and other causes. Agrees with curbing the permitting process for new treated sewage effluent applications that would affect the zones and feels renewals of existing permits should meet the new criteria before being reissued. In Nassawadox Creek, treated sewage from the hospital has for years been entering Warehouse Creek which empties into Nassawadox. Oysters are grown in Warehouse Creek where it joins Nassawadox. This is a case where enough land sites are available for an alternate discharge location. With current technology the Eastern Shore could be a model for returning waste water to the land for later use as irrigation water, something that is in short supply on this narrow peninsula.	DEQ acknowledges the support and the need for alternative sewage disposal.
Josh Bundik	Accomack should be represented on the TAC	The Accomack Northampton PDC Executive Director was included on the TAC
Dave Burden	The Chamber of Commerce is a good avenue for education and getting notifications out.	Noted.
Martha Burns (private citizen)	Supports. Concerned about the survival of Chincoteague Bay. Creating a shellfish aquaculture enhancement zone in Chincoteague Bay and in other areas is a great idea and will assist the watermen and stabilize the communities where they live. The overall economic benefit has far reaching possibilities not only for those directly involved but for the entire region. The public meeting announcement was too late, not widely distributed and held at a bad time. It seems to have been scheduled to be convenient to developers and not to real people. Because of that, do not make any long term decisions based on the input received at the public meeting and next time schedule a meeting announced at least 4 weeks in advance and in the evening. Objects to the Captains Cove decision to reverse the Board's denial of the permit and asks us to encourage the Governor, the VA Attorney, DEQ and SWCB to deny this permit. Offers to assist in any way.	Staff believes the proposal will help maintain or improve water quality in Chincoteague Bay and all waters of the Eastern Shore. Staff will be more sensitive to the scheduling of future public meetings on the Eastern Shore related to this rulemaking. The VA Attorney General's Office is appealing the Captain's Cove decision.
Lois, John and Thomas Cooper (private citizen)	Supports / learn from past mistakes	DEQ acknowledges the support.

Grace D. Cormans (private citizen)	Supports. For 20 years have watched families grow and learn about the marine environment on the eastern shore. Noticed many shellfish closures and deterioration which is sad and embarrassing when trying to show of the area.	DEQ acknowledges the support.
Matt Cormans (private citizen)	Supports.	DEQ acknowledges the support.
Shirley Fauber (private citizen)	Supports. Building is continuing and nothing in place to protect shellfish and seafood for our future generations.	DEQ acknowledges the support.
Orville Fleming (private citizen)	Supports. He has several generations of growers and sellers of oysters and clams. In the early 1970's his father planted clams near the Captains Cove development near Swan's Gut. The silt from the development killed his crop. The loss had a profound effect on his family through the unrepressed manner in which the developer acted which resulted in a long term financial loss in his family. Recently had a conversation with several biologists studying Chincoteague Bay and comparing its pristine quality in order to better understand the current conditions of the Chesapeake Bay and to the extent the Bay would have to improve to be at the level of the Chincoteague Bay. This indicates we must create shellfish aquaculture enhancement zones or we will lose this great asset.	Staff believes the proposal supports the comment.
Jan and John Gardner (private citizens)	Supports.	DEQ acknowledges the support.
Hayden Gorden	VIMS has a long education of these issues. If Captains Cove permit is issued it will open Pandora's box and allow more dischargers. People move to the Eastern Shore because of the good water quality.	DEQ acknowledges the support and the Attorney General's Office has appealed the Captain's Cove decision.
George (Rusty) Gowan (private citizen)	Supports. Volunteered for TAC and provided background experience.	DEQ acknowledges the support and invited George Gowan to serve on the TAC.
David Handshur (private citizen)	Supports. With technology and clean water we can support a sustainable industry with the ability to grow and produce more decent wage jobs. We can set an example if we set a course for long term growth of this industry which will provide stability for our people. Included an article that shows that people were harvesting shellfish and cooking them on the beach 164,000 years ago as a perfect example of a sustainable industry.	Staff believes the proposal supports sustainable industry.
Linda Hartsock (private citizen)	Supports. If these waters are not preserved, they will be lost for future generations due to the booming development interests. Growth and development are inevitable but we are at the crossroads of deciding whether the development interest will destroy our natural resources or whether development can be done in innovative ways that will preserve and improve our environment. Please hold future meetings in the evening and advance meetings well in advance and broadly. Don't make decisions based on the comments you heard at the public meeting on October 17. Many could not attend. Appeal the Captains Cove decision.	DEQ acknowledges the support. Staff will be more sensitive to the scheduling of future public meetings on the Eastern Shore related to this rulemaking. The option to appeal the Captains Cove decision was undertaken by the Attorney General's Office.
Linda Henderson-Gordon	Thanked for doing a great job protecting Swans Gut from a 900,000 gpd freshwater discharge into a saltwater estuary. Suggested an irreversible moratorium on dumping and discharge into public estuaries and make a provision to accommodate the waste on public lands	DEQ acknowledges the support and while the proposal is not a moratorium, it does provide for an analysis to find the best wastewater disposal option.
Granville Hogg	Will residential development and its associated run off be included? There is not a strong cooperation between the agencies to see the 'big picture.' Salinity is important to consider. Is DEQ going to be the regulatory agency to the counties?	Storm water is primarily regulated by another agency (the Department of Conservation and Recreation) and cannot be addressed by this rulemaking. The issue of a fresh water discharge to a salt water system will be considered as we assess the environmental impacts of each disposal alternative.
Ed Hopkins	Supports. Many sustainable industries (aquaculture, ecotourism, sport fishing, commercial (wild)fishing) need clean water both in	DEQ acknowledges the support. Many different stakeholders were

	seaside and bayside estuaries of the eastern shore and are important to the local economy. There are strong special interests against maintaining the healthy environmental chemistry of the coastal waters. Growth is needed but should be targeted to areas with the potential for maintaining environmental integrity. The County's regulations protect their Agricultural Zones, which border the shorelines have been weak by special interests, including developers. The Counties may not be able to control suburbanization given the present County and State laws and ordinances. Therefore, the citizens of the Eastern Shore depend on additional protection for the State. Keep the TAC with scientifically or technologically trained people with a smaller but politically balanced contingency of non-scientists including county officials and citizen leaders.	invited to be on the TAC and most were from the Eastern Shore (aquaculture, developers, environmentalists, agriculture, local population, localities).
Isabella Hopkins (private citizen)	Supports.	DEQ acknowledges the support.
Bryan Horton (Onancock WWTP Operator, Accomack Co)	Educate the public on the many regulations already in place on the Chesapeake Bay side to protect aquatic life. The public needs to know how much non-point source and failing septic systems are contributing to the problem. Provided a reference to a sewer study for DEQ to consult.	DEQ provided a background of the many regulations in place to the TAC before they began deliberations on the new requirements. DEQ consulted several sewer studies on the Eastern Shore during the TAC process.
Robert K. "Bo" Lewis (Mayor, Town of Cheriton)	Interested/concerned/have many questions. Asks for DEQ to attend a Town Council meeting. Proposal could have widespread impacts and is unclear. Strongly requests that the town be on the TAC since it will impact development in Cheriton and would like to ensure fairness from all segments involved (watermen, aquaculture farmers, farmers, public service authorities, developers, government, local population. Sent 3 letters – 2 asking for representation on TAC.	A member of the Town Council was included on the TAC to report back to the Council. Many different stakeholders were invited to be on the TAC (aquaculture, developers, environmentalists, agriculture, local population, localities).
Bowdoin Lusk (aquaculture buyer, seller, packer Atlantic Commodities)	Supports. The presence of aquaculture allows him and family to work and live on the Eastern shore and that industry is dependent on enhanced water quality.	DEQ acknowledges the support.
Frank M. Lusk, Jr. (private citizen)	Supports. Good water quality necessary to save our sustainable aquaculture industry	DEQ acknowledges the support.
Elaine Meil (Executive Director PDC) Accomack/Norhampton PDC Ground Water Committee	Very interested. Passed two motions, one for Chair and Vice Chair to be on TAC and second requesting the Ground Water committee consultant be on TAC. Also want alternates if needed. Encourages notification of and appointees from affected Towns on TAC from Towns.	Included PDC Director and representatives from Towns on TAC.
Mary Miller (private citizen)	Supports. Aquaculture is one of the main industries, employing locals and is a sustainable resource which is expected to expand. This industry needs clean waters to exist. State research from VA Tech shows that in rural areas most job growth occurs in existing industries and aquaculture is thriving and should receive state regulatory support. Ms. Miller sits on Northampton County Planning Commission and heard several citizens address the Commission and asked them to consider impacts to the industry when they make recommendations to the Board of Supervisors. References by speakers to the Commission were made of the Public Trust Doctrine (state Constitution and three VACs). Stormwater is a major concern to the clam growers. Clean tidal waters are important to tourism and to the developing research industry. The Planning Commissions Minutes with the citizens' recommendations were provided to staff.	Staff believes the proposal helps to provide clean waters. Storm water is primarily regulated by another agency (the Department of Conservation and Recreation) and cannot be addressed by this rulemaking.
Chris Moore (CBF)	CBF believes the establishment of Aquaculture Enhancement Zones has merit for both the eastern and western side of Virginia's Eastern Shore. Aquaculture operations exist in both places and should be protected to ensure the future viability of existing and new aquaculture operations. These zones may have applicability as well in the Middle Peninsula and Northern Neck. Look at the applicability of Aquaculture Enhancement Zones for the smaller	While aquaculture zones were not expressed as such in the regulation, the requirement of an alternative analysis for new or increased individual VPDES permit applicants is required for these discharges to all Eastern

	private growers also. Requests to be on the TAC	Shore tidal waters. CBF was invited to serve on the TAC.
Pat Morrison	How will this impact the central sewer needs of the area and private storm water? More education is needed and the towns should be involved and included in the impact assessment.	Storm water is primarily regulated by another agency (the Department of Conservation and Recreation) and cannot be addressed by this rulemaking. All the localities will be assessed for impact, involved in the process and notified.
Robert Myers (private citizen, Nassawadox Creek, Northampton Co.)	Supports. Concerned about freshwater input in to marine waters and how they can destroy newly planted clams. Need to be educated on all existing regulations.	DEQ acknowledges the support.
Katie Nunez (Northampton County Administrator)	Supports. Aquaculture industry is vital to economy and looks forward to reviewing and commenting on proposals for consideration by the Shellfish Advisory Committee. Northampton County Board of Supervisors with names for TAC all of which are employed full time in the aquaculture industry and serve on the County's Aquaculture Committee. Also Vice Chairman Jeff Walker volunteered to serve on TAC to represent Northampton Board of Supervisors.	Several employees of aquaculture industry were included on the TAC.
Silvia Park	The Eastern Shore Radio should be used to inform people about meetings.	Noted.
George Parker (President, Save Our Necks)	Supports. His group is concerned with land use, particularly in Accomack County. Accomack has no surface water runoff ordinance and no recognition of the groundwater issue or impervious surface runoff issues. There are inconsistent views between Accomack and Northampton as well as between people who live on the Bay drainage and the Atlantic drainage. Supports aquaculture and believes it is highly suitable to the Shore and prevents an environmentally friendly means for economic expansion. Recommended Ed Hopkins for TAC and supports also Tony Picardi.	DEQ acknowledges the support and believes the proposal supports the comment.
Steve Parker (Nature Conservancy)	Self interest affects the economy and the environment but economy and ecology can work together. We must look at all sides and resolve conflicts.	DEQ hopes that some conflicts were resolved or at least negotiated during the TAC process.
Anthony Picardi (Save Our Necks)	Supports. Favorable for the future of both the ocean and Bay side. Important to enforce these regulations including the current regulations. Consider the number of jobs provided by the aquaculture industry in the economic analysis. Concerned about freshwater inputs (discharges) can impair clams. Volunteered for TAC and provided experience. The mission of Save Our Necks is to advocate, promote and support responsible growth and leadership in Accomack County (2,000 members). These regulations are the key to sustainable economic development.	DEQ acknowledges the support. The issue of a fresh water discharge to a salt water system will be considered as we assess the environmental impacts of each disposal alternative. There were several environmental groups included on the TAC.
Mike Peirson (Cherrystone Clams)	Supports. Although dischargers may meet standards, they still impact the streams. Additional regulations are needed. Waters need to be much cleaner for clams to grow and thrive.	DEQ acknowledges the support and hopes the proposal will help to protect high quality waters.
F. Victor Schmidt (private citizen)	Supports. Justification for action seen in engineering study on the degree of sewage pollution in Accomack County. High quality marine waters required to sustain the clam aquaculture industry so important to the ES economy. Promising results of triploid oysters should provide further justification. This proposal is a refreshing example of the state public trust responsibilities to protect natural resources which have significant economic and recreational values. Hoping for a meaningful regulation	Staff believes the proposal protects high quality waters.
June Swan	Supports	DEQ acknowledges the support.
Gerald Tracy	We already have laws and regulations and should see what laws exist and see if this can be covered another way. What are the practical implications on development and treatment plans? Local papers or radio should be used to make this known to the public.	There are no laws that require an alternatives analysis. The practical implications are that the applicants (whether localities or private developers) should plan on reviewing alternatives when planning a sewered community. The public hearing will be

		published in the local paper.
Wanda K. Thornton (Accomack County Board of Supervisors)	The regulation is directed at the seaside of the Eastern Shore. The purpose of the regulation seems to articulate an intention to require applicants for discharge permits along the seaside to show they have considered alternatives to discharging pollutants and that the permit produces the least environmental impact. This puts the public in the position of proving a negative that the alternative they seek has the least impact. Furthermore, this is convoluted in that the notice also says the purpose is to establish standards for determining whether new point source discharges will be permitted and to set the limits for the VPDES permit. There is no explanation as to what other waters may be included; the notice seems to include all waters along the seaside. There is no explanation as how the additional issues mentioned in the notice (like cost, technology) would be considered. The notice also states that the Board will consider amendment the Policy for Shellfish Growing Waters and Water Quality Standards public hearing requirements without any further explanation. The Board is using this rulemaking to stop discharge permits from being issued by VDH. Ironically, the Board also wants to prevent a shift of pollution for surface water to ground water from onsite systems. However no alternatives for accomplishing this and no explanation for where the sewage will be disposed are provided. The notice also fails to acknowledge any other sources of pollution and most waters in upper Chincoteague Bay are polluted primarily by farm runoff. The notice is vague and too broad. The Board should make designations water body by water body to avoid undue hardship on the community. The VA Code says that applicants who meet "minimum treatment requirements" should be allowed to discharge unless they fail to meet water quality standards. This rule seems to implement a regulation that makes it impossible to meet water quality standards. The proposal seems to have as its sole motivation to stop all business and residential growth on the Eastern Shore. The Eastern Shore has many elderly residents and residents below the poverty levels. This regulation would devastate the tax base. DCRs erosion and sediment controls address sediment runoff from development. The Shoreline Surveys from DSS is a valuable tool that can be used to assess problems from defective septic systems and track its origin. There is no substantiation that development is causing condemnations. Accomack should be on the TAC.	A Notice of Intended Regulatory Action is supposed to be broad in order to get input from the public on directions to take to produce a reasonable regulation. The proposal drafted does take into account cost and technology as well as environmental impact in deciding upon the best wastewater disposal option. It is not a prohibition on discharges rather an effort to ensure the alternative with less of an environmental and socio-economic impact will be chosen. The director of the PDC was included on the TAC.
Joe Vaccaro (Town Manager Cape Charles) Tom Bonadeo (Town Planner Cape Charles)	Recommend Tom Bonadeo to TAC	Tom Bonadeo was invited to serve on the TAC
Dave Vaughn (private citizen)	Supports. Good water means good jobs, including aquaculture, tourism. Shore can grow with a balance between residential and commercial/industrial.	DEQ acknowledges the support.
Jeff Walker (Northampton Board of Supervisors)	The Board endorses the concept of retention of sewage, farm and storm water run off. Include both the sea and the Bay. Please include a member of the Board on the TAC.	Both the sea and Bay dischargers are included under these new requirements. Included the PDC Director and representatives from Towns on TAC to represent the localities.
Robert Wright (private citizen, Greenbackville, Accomack Co.)	Supports. Unless regulations are adopted to protect these areas for shellfish aquaculture, the over development of communities and discharges will make these areas unavailable due to pollution. Recreations and shellfish aquaculture is a booming business. Please appeal the Captains Cove decision.	The option to appeal the Captains Cove decision was undertaken by the Attorney General's Office.
Myron and Frances Birch Forrest Lee and Sandra McDowell Sue Gilmore Kelly Griffin John Dunleavy	These individuals copied staff on a letter sent to the Attorney General regarding their desire to appeal the Captain's Cove decision.	The option to appeal the Captains Cove decision was undertaken by the Attorney General's Office.

Trudy and Jim Schmalenberger		
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Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulatory action may decrease disposal family income if a wastewater management alternative is chosen that results in increased sewer rates; however, this may occur regardless of this proposal.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
	9 VAC 25-260-275	There is no current requirement for a wastewater management alternatives analysis. There currently is a process for a public hearing and possible permit denial under existing section 270.	In subsection A and B of this section, the proposal specifies that the provisions apply to new or expanding individual VPDES permit applications discharging to or affecting waters on the Eastern Shore. This section is initiated when applications for new or expanded VPDES discharges to Eastern Shore waters are not denied pursuant to 9 VAC 25-260-270 but still result in a shellfish condemnation. These applications must have an analysis that shows if a wastewater management alternative other than a surface water discharge would be feasible, produce less of an environmental impact, and not result in significant social and economic impacts to beneficial uses and to the locality and its citizens. The rationale of this subsection is to specifically identify the type of VPDES permits affected by the rule and impart the criteria that must be included in the impacts analysis.

			<p>Subsection C defines condemnation for Part VI and the rationale is to ensure clarity.</p> <p>Subsection D inserts an allowable phased approach to the analysis and the rationale is to help reduce costs to the localities and other applicants. First the feasibility of each alternative can be analyzed. If technically feasible, then the analysis proceeds to include the environmental, socio-economic and opportunities to mitigate any adverse impacts.</p> <p>Subsection E describes the three scenarios that can result from the analysis and how each scenario proceeds. The first scenario is that the VPDES surface water discharge is the best option (the only technically feasible option or the best option for the environment). In that case, the VPDES application proceeds. The second scenario is that an alternative proves to be the best environmental option but results in adverse socio-economic impact. In that case, the VPDES application proceeds. The third scenario is that an alternative is the best environmental option and causes no significant adverse socio-economic impact. In that case, a good faith effort must be made to pursue the alternative. If the alternative is disapproved by the appropriate regulatory authority, then the VPDES application proceeds. The rationale is to ensure clarity so applicants know all possible outcomes.</p> <p>The rationale for including this entire section is to provide additional water quality protection for clams and oysters in waters on the Eastern Shore of Virginia and to ensure that the wastewater management disposal alternative chosen for that area has less of an environmental impact than another alternative. The problem is intended to reduce condemnations on the Eastern Shore so more waters may be protected for clam and oyster production.</p>
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June 19, 2008
Water Quality Standards Proposed Amendments

9 VAC 25-260-275. Protection of Eastern Shore Tidal Waters for Clams and Oysters

- A. This section applies to applications for individual Virginia Pollutant Discharge Elimination System (VPDES) permits authorizing new or expanded discharges to or otherwise affecting Eastern Shore tidal waters which include all tidal rivers and creeks on the Eastern Shore (Accomack and Northampton Counties) including the tidal waters within the barrier islands on the eastern seashore of the Eastern Shore (does not include Atlantic Ocean waters) and all tidal rivers and creeks on the western bayside and including the Chesapeake Bay to a point one mile offshore from any point of land on the Eastern Shore.
- B. When such application proposes a new or expanded discharge that would not be denied pursuant to 9 VAC 25-260-270 but would result in shellfish water condemnation, then the application shall be amended to contain an analysis of wastewater management alternatives to the proposed discharge. An application shall be deemed incomplete until this analysis is provided to the Department.
- C. For purposes of this part, condemnation shall mean a reclassification of shellfish waters by the State Department of Health to prohibited or restricted (as defined by the US Food and Drug Administration, National Shellfish Sanitation Program, Guide for the Control of Molluscan Shellfish, 2005 Revision) thereby signifying that shellfish from such waters are unfit for market.
- D. The alternatives analysis shall first identify and describe the technical feasibility of each wastewater management alternative to the proposed new or expanded discharge. If the analysis demonstrates that any of the identified alternatives are technically feasible, then the analysis shall further describe the environmental, social and economic impacts and opportunities to mitigate any adverse impacts for those alternatives.
- E. If the alternatives analysis demonstrates that the proposed new or expanded discharge is the only technically feasible alternative or produces the least environmental impact of all the technically feasible alternatives, the application will be processed in accordance with 9 VAC 25-31-10 *et seq.* (VPDES Permit Regulation). If the analysis demonstrates that a technically feasible alternative produces less of an environmental impact than that associated with the proposed new or expanded discharge but results in significant adverse social and economic impacts to beneficial uses and to the locality and its citizens, the application shall be processed in accordance with 9 VAC 25-31-10 *et seq.* If the analysis demonstrates that a technically feasible alternative produces less of an environmental impact than that associated with the proposed new or expanded discharge and does not result in significant adverse social and economic impacts to beneficial uses and to the locality and its citizens, then processing of the VPDES application shall be suspended while the applicant makes a good faith effort to obtain approval from the appropriate regulatory authorities for the alternative. Processing of the application shall be resumed only if the alternative form of wastewater management is disapproved by the appropriate regulatory authorities.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY**

SUBJECT: Request for Approval of an Ad Hoc Technical Advisory Committee for Amendment of 9 VAC 25-260 (Water Quality Standards) and 9 VAC 25-370 (Policy for the Protection of Water Quality in Virginia's Shellfish Growing Waters) OR Aquaculture/Shellfish Water Quality Standards

DATE: December 13, 2007

PURPOSE OF COMMITTEE: A Notice of Intended Regulatory Action (NOIRA) was published in the Virginia Register on September 18, 2007 indicating our intent to amend these regulations, and soliciting persons with an interest in the regulation to participate on a Technical Advisory Committee for regulation development prior to the public comment period. The purpose of the rulemaking is to consider a new designation of "Aquaculture Enhancement Areas" on the Eastern Shore of Virginia and narrative criteria to provide additional protection to these waters that are used or could reasonably be used for shellfish aquaculture or to support aquaculture by requiring applicants to demonstrate that practicable alternatives to discharging pollutants to the listed waters have been evaluated and that the proposed discharge is the alternative that produces the least environmental impact. The rulemaking will also consider how the shellfish policy in 9 VAC-25-370 and the water quality standards (e.g. shellfish public hearing requirements in 9 VAC 25-260-270) should be amended in order to consolidate water quality protection efforts for shellfish for the purposes of improving the clarity and efficiency of implementation of these related activities.

The following list of names includes some who have requested to be on the committee and others we chose so that the group was representative of affected stakeholders.

Upon approval of the membership list, the committee members will be notified and the first meeting scheduled. Elleanore Daub will be the DEQ Central Office staff member coordinating this effort.

Please indicate your concurrence with the attached list of members in the space provided below. Upon completion, please return this document to:

Elleanore Daub
9th Floor

WATER PERMIT PROGRAM MANAGER _____
Kyle I. Winter.

WATER QUALITY PROGRAMS DIRECTOR _____
Ellen Gilinsky, Ph.D.

POLICY MANAGER _____
Rick Linker

DEPUTY DIRECTOR FOR PROGRAM MANAGEMENT _____
James J. Golden

AGENCY DIRECTOR _____
David K. Paylor

PROPOSED COMMITTEE MEMBERSHIP: The following persons are recommended for the aquaculture/shellfish water quality standards rulemaking:

Environmental:

Chris Moore – Chesapeake Bay Foundation
Steve Parker - The Nature Conservancy (Director of the VA Coast Reserve)
John Chubb - Citizens for a Better Eastern Shore or CBES

Business/Agriculture

Butch Nottingham – VDACS Accomack Co.
Jane Corson-Lassiter - Eastern Shore Soil and Water Conservation District
David Hickman – Vegetable grower
Robert Bloxom Jr. – Aquaculture Advisory Board member
Mike Peirson – Northampton/bay side
Andy Drewer – Accomack/bay side
Pete Terry – Ocean side
John West – Ocean side

Development Community

Ralph Dodd - Developer
Horace Seybolt – Seaside landowner/developer

Local Government

Terry Long – Cheriton Town Council
Robert Ritter – Chincoteague Town Manager
Tom Bonadeo – Town of Cape Charles Planning
Elaine Meil – Dir of Planning for Accomack-Northampton PDC

Academic

Mark Luckenbach – VIMS Eastern Shore Laboratory
Marcia Berman – VIMS Land use related to Aquaculture

Citizens

George Gowen – Background in water issues and community involvement
John Tankard – Nursery owner, VMRC Member

Technical Support to TAC from State Agencies

VDH (Dan Alexander, Robert Croonenberghs and eastern shore staff), DCR (Lee Hill and staff) and DEQ (Alan Pollock, James McConathy, Elleanor Daub, Vijay Satyal, Laura McKay).